Supreme Court, U.S.
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No. 00-1850

IN THE

Supreme Court of the United States

LANDMARK CAPITAL II, LLC
and ROBERTA K. LOWERY,

Petitioners,

v.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III; CAL-AMERICAN PROPERTY FUND VI; CAL-AMERICAN PROPERTY VII; and CAL-AMERICAN PROPERTY FUND IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under federal antitrust law, can a monopoly exist if one who is denied access to a particular market has reasonably interchangeable alternatives available?

2. Under federal antitrust law, is every limited partnership its own product market, or does the product market consist of all reasonable interchangeable investment alternatives?

3. Under federal antitrust law, is an illegal monopoly created when an investor in a limited partnership agrees in the limited partnership agreement that while he/she may resell his/her limited partnership units to a third person, such purchaser will only become a substitute-limited partner if the general partner, in the reasonable exercise of his discretion, consents?

4. Under federal antitrust law, is there an antitrust injury sufficient to support a claim of an illegal monopoly if the purported monopolistic act does not adversely affect competition, as a whole, in the relevant market?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondents are Cal-American Income Property Funds III, IV, VI and VII, California limited partnerships. Respondent Fred Hameetman is the General Partner of these Funds.

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I.

STATEMENT OF THE CASE

This case arises out of the routine application of one of the most basic principles of federal antitrust law. In determining whether there has been a violation of Section 2 of the Sherman Act (which prohibits the monopolization of a relevant market), a court must first define the relevant market. In this respect, it has been firmly established by this Court that a particular product cannot be its own relevant market if there are reasonably interchangeable substitutes available.

In the present case, Petitioner Landmark Capital II, LLC ("Landmark II") is attempting to "carry the banner" of an unsuccessful lawsuit commenced by its predecessor, Landmark Capital I, LLC ("Landmark I"). The procedural history of the underlying matter reveals the frivolous, last minute creation of Landmark II's antitrust allegations and demonstrates why the dismissal of this claim for Landmark II's failure to allege a cognizable relevant market, fails to merit United States Supreme Court review.

This case began with Landmark I's contention that after it purchased a few token limited partnership units in Cal-American Income Property Funds III and IV (the "Funds") from limited partner Roberta Lowery, it should have been made a substitute-limited partner therein, automatically. As a substitute-limited partner, Landmark I's goals were to obtain a list of the names and residential addresses of all investors in the Funds, make them tender offers, buy them out and remove Fred Hameetman as the General Partner. With control of the Funds, Landmark I could

either reap the profits when the limited partnerships expired, or cause the Funds to dissolve earlier, or cause a sale of the Funds' assets prior to dissolution, depending on Landmark I's financial objectives.[1]

The Funds' General Partner, however, exercised his reasonable discretion under the Limited Partnership Agreements and declined to admit Landmark I as a substitute-limited partner. Thereafter, Landmark I filed a Complaint against Funds III and IV and their General Partner on June 5, 1998 in the Los Angeles County Superior Court. This Complaint contained four causes of action for: 1) breach of contract; 2) breach of the implied covenant of good faith and faith dealing; 3) breach of fiduciary duty; and 4) declaratory relief. On August 26, 1998, Landmark Capital I voluntarily filed a First Amended Complaint alleging the same four causes of action.

Because Landmark I had no contractual relationship with the Funds or their General Partner, the court dismissed Landmark I's first three causes of action, *without leave to amend*. The court then gave Landmark I leave to file an amended complaint realleging its fourth cause of action for declaratory relief, only.

On December 31, 1998, Landmark I filed a Second Amended Complaint which named Landmark II and Roberta K. Lowery, *as additional Plaintiffs*, and Funds VI and VII, *as additional Defendants*. This Second Amended Complaint contained the same four causes of action.

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1. Under California law, a list of investors is only available to limited or substitute limited partners.

Because one of the grounds for the earlier Demurrer was that Landmark I had failed to pay Ms. Lowery for her units, Respondents had argued that Landmark was not even entitled to become an economic assignee, let alone a substitute-limited partner. Thus, Landmark II was formed specifically to purchase and pay for a few token units from Ms. Lowery in Funds III and IV (and also Funds VI and VII), so as to remove this objection. Roberta Lowery was a nominal party dragged into this lawsuit to "prop up" the breach of contract claims with the allegation that even if Landmark I and II did not have a direct contractual relationship with the Funds and their General Partner, Ms. Lowery did.

Landmark II's objectives were the same as Landmark I's; that is, to make tender offers, remove the General Partner and gain control of the Funds. Indeed, as Landmark II admits, the heart of its alleged antitrust injury is "being precluded from participating in a potentially lucrative market." (Landmark's Opening Brief to the Ninth Circuit, p. 18, lns. 13-14.)

On March 12, 1999, the Funds and their General Partner brought a Demurrer to the Second Amended Complaint on the ground that because Landmark I had only been given leave to reallege its fourth cause of action for declaratory relief, there was no authority to file a Second Amended Complaint naming additional Plaintiffs and Defendants. The court agreed and sustained the Demurrer, with prejudice, as to Landmark I's claims and, without prejudice, as to the claims of Landmark II and Ms. Lowery.

At this point, Landmark II (hereafter for simplicity's sake, "Landmark") and Roberta Lowery, apparently leery of filing a third complaint in California state court before

the same Judge, opted to a re-file the same four claims in the Federal District Court, Central District of California, with a new claim alleged against the Funds and their General Partner for a violation of Section 2 of the Sherman Act, as their "ticket" to the courthouse. In essence, Landmark and Mrs. Lowery alleged that by refusing to admit Landmark as a substitute-limited partner, the Funds and their General Partner were operating an illegal monopoly.

On March 17, 1999, the Funds and their General Partner brought a Motion to Dismiss this Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) (*i.e.*, a lack of complete diversity between the parties) or, alternatively, to dismiss the antitrust claim for failure to state a claim upon which relief could be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

In analyzing whether there had been an antitrust injury in the relevant market, the District Court did *not* adopt Landmark's extraordinary, but erroneous, point of view, that every potential business opportunity is its own relevant market and that every lost business opportunity is its own separate antitrust violation, especially as Landmark, whose very business is to purchase limited partnership units all across the United States, had reasonable investment alternatives available. Nor did the court accept Landmark's egocentric claim that it had suffered antitrust injuries simply because its own personal desires could not be met.

As to Ms. Lowery, the District Court correctly ruled that she had no antitrust claim, either, as her inability to demand that the buyer of her units be admitted as substitute-limited partner was strictly limited by contract (*i.e.*, the Limited

Partnership Agreements). Absent a legitimate federal question, all remaining pendent state claims were dismissed.[2]

On March 11, 2001, the Ninth Circuit Court of Appeals affirmed this Judgment, agreeing that Landmark and Ms. Lowery had failed to state facts alleging a "cognizable relevant market" for antitrust purposes. As set forth below, this Decision is correct and does not warrant review by the United States Supreme Court.

II.

REASONS FOR DENYING THE WRIT

In a transparent attempt to grab this Court's attention, Landmark contends that the Ninth Circuit's ruling has added to a "glaring split" of authority between the federal courts on whether securities can be the subject of antitrust regulation. In truth, the issue of whether securities can be subject to antitrust regulation was *never an issue that was presented to or even addressed by either the District Court or the Ninth Circuit*. Instead, as previously stated, the fulcrum issue was whether Landmark had alleged facts defining a plausible relevant market. This is the same threshold issue that must be reached in any antitrust case, regardless of whether the product in that market is a security or some other commodity.

In performing this analysis, the District Court simply applied this Court's ruling in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 1012

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2. Landmark conceded that jurisdiction could not be based on diversity.

(1956) that the relevant market "is composed of products that have reasonable interchangeability." Because Landmark, as an entity whose very business is to purchase limited partnership units across the United States, had other reasonably similar investment opportunities available (*i.e.*, Landmark could simply purchase limited partnership units and potentially become a substitute-limited partner in other limited partnerships), the court correctly concluded that Landmark was not excluded from the relevant market and, therefore, did not suffer any antitrust injury.

In affirming this Decision, the Ninth Circuit, also cited page 927 of *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F. Supp. 922 (D. Del. 1983) and page 436 of *Queen City Pizza, Inc. v. Domino's Pizza*, 134 F.3d 430 (3d Cir. 1997). Both of these pages reiterate this Court's prior holdings that a relevant market must include reasonably interchangeable substitutes. Neither case was cited by the Ninth Circuit for the proposition that securities can never be the subject of antitrust regulation, nor did either opinion so hold.

The ruling on page 436 of *Queen City Pizza* that there can be no antitrust violation where access to a product is determined by a contract, is further support for the dismissal of Ms. Lowery's claims. Once again, Ms. Lowery's inability to demand that a purchaser of her units become a substitute-limited partner is a matter of state contract, not federal antitrust law.

In short, notwithstanding Landmark's disingenuous presentation, there is no "glaring split" of authority between the Circuits. All are in agreement as to the correct criteria to be used in analyzing the relevant market.

Furthermore, the Ninth Circuit's Opinion does not affect, nor will it affect," thousands of investors," as Landmark claims. This Decision affects only Landmark, which is simply disgruntled because its "take over" plan for the Funds did not succeed.

Absent a legitimate conflict between the Courts of Appeal, or an important and unresolved issue of federal law, Landmark's Petition does not meet the criteria for review and should be denied.

III.

LANDMARK'S MISSTATEMENTS OF FACT AND LAW

Pursuant to United States Supreme Court Rule 15(a) Respondents note that Landmark has made the following misstatements of fact and/or law to this Court:

Misstatement:

> The Ninth Circuit concluded as a matter of law that a single buyer of securities *could never* monopolize the market for a company's securities by wilfully excluding all other buyers. (Landmark's Question Presented No. 1.) (Italics added.)

Truth:

> The Ninth Circuit merely ruled that, under the facts of *this case*, Landmark had failed to allege the monopolization of a cognizable relevant market.

Misstatement:

The Ninth Circuit ruled as a matter of law that a market consisting of a single company's securities *could not under any circumstances* constitute a relevant market for federal antitrust purposes. (*Id.*, No. 2.) (Italics added.)

Truth:

The Ninth Circuit merely ruled that under the facts of *this case*, Landmark had failed to allege the monopolization of a cognizable relevant market.

Misstatement:

The Ninth Circuit concluded that *thousands of investors* holding securities in thinly traded limited partnerships have no recourse under the federal antitrust laws when a single buyer wilfully excludes all other buyers. (*Id.*, No. 3.) (Italics added.)

Truth:

The Ninth Circuit merely ruled that *one investor*, Roberta Lowery, had no antitrust claim, as her demand that Landmark become a substitute-limited partner after purchasing her units was a matter of state contract, not federal antitrust law.

Misstatement:

> The Third Circuit held in *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 769 F.2d 152 (3d Cir. 1985) that a market consisting of a single company's securities *could not under any circumstances* constitute a relevant market for federal antitrust purposes. (*Id.*, No. 2.) (Italics added.)

Truth:

> The Third Circuit merely followed the well-known rule established by this Court that the relevant market is defined by the "cross-elasticity" of a product; that is, whether reasonable alternatives to a product are available. (*See Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24 (1962) and *du Pont de Nemours, supra*, at 404, 76 S. Ct. 994, 1012.)

Additionally, Landmark has falsely insinuated that the District Court committed error in failing to issue any written or oral findings of fact and conclusions of law in support of its ruling. (Pet., p. 5, ¶ 3.) Fed. R. Civ. P. 52(a) makes plain that: "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 . . . ."

Finally, Landmark has erroneously and disrespectfully stated that the Ninth Circuit "attempted to avoid the task of careful factual inquiry" (Pet., p. 14, Conclusion), when it was undisputed that Landmark is an entity whose business is purchasing limited partnership units across the United States and, thus, had reasonably interchangeable investment

alternatives available. Under the circumstances, no further factual inquiry was necessary, as the only remaining issues were those of law (*i.e.*, based on the undisputed facts, had Landmark alleged a cognizable relevant market?, etc.) (*See* Respondents' Questions of Law, *supra*.)

IV.

CONCLUSION

For all the foregoing reasons, this Honorable Court should deny the Petition.

Respectfully submitted,

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